IN THE

Supreme Court of the United States

October Term 1944

No. ~~1344~~ 106

CLARENCE ARTHUR LANE,
PETITIONER,

vs.

UNITED STATES OF AMERICA
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Clarence Arthur Lane, prays that a Writ of Certiorari issue to review the decision and judgment of the Circuit Court of Appeals for the Fifth Circuit, entered April 24, 1945 (R-48-51), affirming the judgment of guilt and sentence imposed upon petitioner by the District Court of the United States for the Southern District of Florida, on July 20, 1944 (R-7-8). Petition for rehearing in said cause was denied by said Circuit Court of Appeals on May 17, 1945. (R-55).

I.

SUMMARY AND SHORT STATEMENT

Petitioner was tried and convicted in the District Court of the United States for the Southern District of Florida upon an indictment containing four counts. (R. 1-4). The first count charged petitioner and a co-defendant with carrying on the business of a distiller by making mash fit for distillation without having given bond as required by the Internal Revenue laws. The second count charged possession of seventy-one gallons of distilled spirits, without Internal Revenue stamps affixed to the containers thereof. The third count charged carrying on the business of a distiller with intent to defraud the Government of Internal Revenue tax on the seventy-one gallons of spirits so produced. The fourth count charged the setting up of a distillery for the production of said distilled spirits without the requisite sign thereon as required by the Internal Revenue laws.

Petitioner was convicted on all four counts and sentenced to imprisonment for two years and to pay a fine of $100.00 on each of the first and third counts of the indictment, two years and one day imprisonment on the second count, and six months imprisonment on the fourth count, all sentences to run concurrently.

Petitioner was tried jointly with his co-defendant Walter Lane, an uncle of petitioner, but at the conclusion of the Government's case in chief Walter Lane changed his plea from Not Guilty to Guilty (R-28) and the trial proceeded against petitioner solely.

On September 21, 1943, three government investigators of the Alcohol Tax Unit, McDonald, McMullen

and Anderson, came upon a moonshine still "about two miles south of Zephyrhills a little off of the Plant City road" (R-12). The still was near the edge of a swamp not far from a little stream. The agents came up from the swamp through the underbrush a distance of about 40 feet. The still was in operation. Three men were working at the still and after a period of time they evidently spied one of the agents and started to run (R-13). Co-defendant Walter Lane was apprehended about one hundred feet away from the still, while the other two men escaped. (R-13). Agent McMullen presumed to identify petitioner as being one of the two men who escaped, Agent McDonald was doubtful of his identification of petitioner, while Agent Anderson could not identify petitioner at all. (R-17; 21-22; 26-27). A model A Ford truck was seized about one hundred fifty feet away from the still-site and later confiscated (R-13; 15-16). The truck "looked like" one previously sold by witness A. F. Griffin to "one of the Lane boys". The truck was not otherwise connected with petitioner (R-24). Containers were found at the still without revenue stamps thereon and there was no sign at the still-site as required by the revenue laws (R-15). The third man at the still was never identified.

Leaving the still, two of the agents went to petitioner's home several miles away from the still toward Zephyrhills and left word with his wife for petitioner to "come in" the next day and make bond (R-14). He did not "come in" the next day so the agents that afternoon took out an "arrest warrant" for petitioner and on the following day the agents, together with the deputy United States Marshal, went to petitioner's home. Finding no one there the agents proceeded to make an exploratory search of the premises inside and out (R-14). They found what they termed "a square copper

still" also a stock of cartons and some glass jugs. Later, armed with a search warrant subsequently procured, the agents returned to petitioner's home and "searched the premises" (R-14). No one was at home but the agents left word with petitioner's uncle that they would leave a copy of the search warrant "in the garage." Numerous articles, such as jugs, glass jars, sacks of scratch feed, etc., were found and seized "and brought into Tampa". No search warrant was ever offered or admitted in evidence. These articles so seized were later admitted in evidence (R-23). No formal objection was made to the introduction.

Petitioner produced witnesses in an effort to establish an alibi. These witnesses, J. D. Wells and W. H. Barber, placed the petitioner in Dade City, Florida, fifteen miles away from the still-site, at the time of the raid (R-29-31). Petitioner himself testified that he was in Dade City at the time (R-34-36).

Petitioner made two contentions before the Circuit Court of Appeals: First, that the evidence, particularly on the part of identification of petitioner, was insufficient; and, Second, that the seizure of the articles at petitioner's home and their subsequent introduction in evidence, without showing of lawful right to search, was a violation of petitioner's constitutional rights under the Fourth and Fifth Amendments. Because of the limited scope of the Writ of Certiorari in this Court, the first of these contentions will not be presented and will be considered as having been foreclosed by the judgment of affirmance in the Circuit Court of Appeals.

II.

THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Opinion of the United States Circuit Court of Appeals for the Fifth Circuit, entered April 24, 1945, is not yet reported, but is attached as an appendix hereto, marked Exhibit A.

III.

BASIS OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment and opinion entered in this cause by the United States Circuit Court of Appeals for the Fifth Circuit, under the provisions of Section 240 (a) of the Judicial Code of the United States, as amended. 28 U. S. C. A. 347 (a).

The Opinion of the Circuit Court of Appeals for the Fifth Circuit was filed April 24, 1945, Order Denying Rehearing was filed May 17, 1945, and this Petition is presented and filed in the office of the Clerk of this Honorable Court within a time less than thirty days therefrom.

IV.

QUESTIONS PRESENTED

The sole fundamental question presented in this petition is as follows:

(1) The introduction in evidence of the articles seized at petitioner's home, absent showing of lawful right to search for and seize the same, violated petitioner's rights under the Fourth and Fifth Amend-

ments, and such violation was not cured or waived by failure of petitioner's counsel at the trial to object.

V.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved herein are set forth in the appendix to the accompanying Brief marked Exhibit A thereof and by reference made a part of this petition.

VI.

REASONS FOR GRANTING THE PETITION

(1) The Circuit Court of Appeals, in holding that the search of petitioner's home and the seizure of articles therein, and their subsequent introduction in evidence against petitioner, was legal and violated no right of petitioner, has decided an important Federal question in a way that is probably in conflict with applicable decisions of this Honorable Court.

(2) The Circuit Court of Appeals, in holding as aforesaid, and relying also upon failure of petitioner's counsel to object at the trial, has decided a Federal question in a way probably in conflict with applicable decisions of this Honorable Court.

VII.

NATURE OF CASE, STATEMENT OF GROUNDS, QUESTION INVOLVED IS SUBSTANTIAL, AND CASES SUSTAINING JURISDICTION

This is a case where a man's home was searched, articles taken therefrom and later introduced in evi-

dence against him, without there being shown by the government that the Federal officers had a right to raid his home and search it. The search was made in the absence of petitioner. The articles constituted a very important part of the government's proof at the trial. The officers first had a Federal warrant for petitioner's arrest, but when they went to his home he was not there. Undaunted, the officers searched his home and premises. Based upon what they observed there in the absence of petitioner, the officers returned to Tampa and were supposed to have procured a search warrant. They returned to petitioner's home, again found no one there, but proceeded to search the place all over again, seized the articles and brought them to Tampa. They were later introduced at the trial, but peculiarly enough, neither the search warrant nor the warrant of arrest, as legal prerequisites of the validity of the search and seizure, were never produced nor were they ever even offered at the trial. It is true that petitioner's trial attorney made no objection when the articles were offered in evidence, and the main burden of the government's case on the appeal to the Circuit Court of Appeals was that even if the search and seizure were illegal and the introduction of the seized articles erroneous, petitioner had waived his constitutional right to object after they were introduced.

This case presents squarely the proposition of whether or not the government may use those articles admittedly seized from and out of a person's homeplace in evidence against him in a criminal prosecution without first showing that they were lawfully obtained and that his constitutional rights under the Fourth and Fifth Amendments were not being invaded.

That such a question is substantial cannot be gainsaid. The most fundamental rights of a resident of this country are those contained in the Bill of Rights, among which is the protection against unreasonable search and seizure and the protection against compulsory self-incrimination. The Constitution and laws of the United States are explicit on the manner in which the search of a man's home may be made. These provisions are exclusive and must be strictly followed. Courts should be zealous to see that the constitutional rights of the citizen are protected and preserved. Constitutional guaranties must be kept alive even if new breath must be breathed into the fabric of the law from time to time. The McNabb case (318 U. S. 332) and the Malinski case (65 S. Ct. 781) point the way to this view.

Cases believed to sustain the jurisdiction of this Court as showing the substantial character of the question here presented are as follows:

McNabb vs. *U. S.*, 318 U. S. 332.

Malinski vs. *The People of the State of New York*, 65 S. Ct. 781.

Amos vs. *U. S.*, 255 U. S. 313.

Boyd vs. *U. S.*, 116 U. S. 616.

Chavez vs. *U. S.*, 277 U. S. 591.

Clyatt vs. *U. S.*, 197 U. S. 207.

Go-Bart Importing Co. vs. *U. S.*, 282 U. S. 344.

Grau vs. *U. S.*, 287 U. S. 124.

Savage vs. *U. S.*, 257 U. S. 644.

Silverthorne Lumber Co. vs. *U. S.*, 251 U. S. 385.

WHEREFORE it is respectfully submitted that this petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit be granted.

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EXHIBIT A

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED APRIL 24, 1945.

Before SIBLEY, WALLER, and LEE,
Circuit Judges.

SIBLEY, Circuit Judge: Appellant Clarence Arthur Lane and his uncle, Walter D. Lane, were indicted for carrying on the business of a distiller without giving bond and with intent to defraud the United States of the tax, for possessing unstamped liquors, and for working at an unlawful distillery. During the trial the last named withdrew his plea of not guilty and pleaded guilty. The appellant was convicted on all counts, was sentenced, and appeals. Two points are argued in his behalf: 1, The motion for a verdict of acquital ought to have been granted. 2. It was error to admit evidence procured by a search without a warrant of the premises around his home, though no objection to its admission was made.

I. Two witnesses for the prosecution testified to watching three men operating two stills near midday and less than 100 feet distant, for fifteen or twenty minutes, and to recognizing the two Lanes, but not being acquainted with the third man who escaped. Walter Lane only was caught at that time. Seventy-one gallons of whiskey had been made and put into syrup jugs. A Ford truck was hidden in the bushes, the truck showing that it had been used in hauling material to the stills. It was proven that the truck had been seen at appellant's house a number of times, and was driven by him. A warrant of arrest was taken to appellant's home the next day, but he was not at home. In looking for him the officers observed a part of a still in the open near his house, and in the garage saw some feed sacks and syrup jugs like those at the still. The next day they returned with a search warrant and found a large number of the glass jugs in cartons, several sacks of the same brand of "scratch feed" as the mash at the

still was made of with syrup added. A little charcoal and some bricks like those used at the stills was also found. For the defense, appellant testified that he was not at the stills and had nothing to do with them, but was several miles away near Dade City when they were raided. He said he had the feed at his house for his chickens, but they had died off; the jugs contained and had contained syrup, about 100 gallons, but none had been used to make liquor. The alleged still at his house he used as a watering trough. Three other witnesses made out a strong alibi, if they were correct about the date they saw appellant at and near Dade City. Walter Lane did not testify.

It is not unusual that positive identification of an accused is met by evidence of alibi. The truth between the two is a matter for the jury. There was no error in submitting the question to them.

2. No error appears in reference to the evidence of what was found at appellant's home. The first time the officers went there they had a warrant of arrest, and had right to look round the house and in the garage for the person they sought. What they saw was open to view, and can hardly be called a search. They returned with a search warrant and saw the same things and found much more. Appellant did not see fit to interpose any objection to the evidence, but elected to rely upon explanation. No ruling of the court was invoked. No error was committed.

JUDGMENT AFFIRMED.

A True copy:
Teste:

OAKLEY F. DODD
Clerk of the United States Circuit Court
(Seal) of Appeals for the Fifth Circuit.

(19)

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

I.

THE OPINION

The petitioner herein, by a Petition for Writ of Certiorari, seeks a review of a Judgment and Opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which Opinion and Judgment is found in the record on pages 48 to 51. Copy of the Opinion is a part of the Appendix, marked Exhibit A, and attached to the petition herein. Said Judgment and Opinion is an

affirmance of judgment and sentence imposed against petitioner by the United States District Court for the Southern District of Florida, which judgment is set out in the record at pages 5-8, inclusive.

II.

STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOLVED

This statement is set out in the accompanying Petition under Part III, which is hereby adopted and made a part of this brief by reference.

III.

STATEMENT OF THE CASE

A concise statement of the case, containing all that is material to the consideration of the questions presented, is set out in the accompanying petition under Part I, which is hereby adopted and made a part of this brief by reference.

IV.

SPECIFICATION OF ERRORS TO BE URGED

This specification is set out in the accompanying petition under Part IV, which is hereby adopted and made a part of this brief by reference.

V.

ARGUMENT

Summary of Argument

Point 1. The search of petitioner's home and the

seizure of articles therein and their later introduction in evidence against petitioner in a criminal prosecution was an invasion of petitioner's constitutional rights under the Fourth and Fifth Amendments.

Point 2. The trial court should have required the government to show its legal authority for seizing the articles at petitioner's home before permitting the same to be introduced in evidence against him, notwithstanding petitioner's counsel at the trial failed to object thereto, inasmuch as the same involved a fundamental right of petitioner guaranteed by the organic law.

Point 1.

The search of petitioner's home and the seizure of articles therein and their later introduction in evidence against him in a criminal prosecution was an invasion of petitioner's constitutional rights under the Fourth and Fifth Amendments.

The Fourth Amendment to the Constitution, being a part of the Bill of Rights, guarantees that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * * ."

Such fundamental right must be liberally construed to preserve the citizens' right to immunity from unreasonable search. *Grau* vs. *U. S.*, 287 U. S. 124; see also *Go-Bart Importing Co.* vs. *U. S.*, 282 U. S. 344. This amendment stems from the principle of the common law securing to every citizen in his home and office immunity from unreasonable interference by official authorities.

In *Gildrie* vs. *State*, 94 Fla. 134, 113 So. 704, it was flatly stated by the Supreme Court of Florida that:

> "The search of a private dwelling without a warrant is, within itself, unreasonable and abhorent to our laws."
>
> (See also *Brown* vs. *State* 98 Fla. 871, 124 So. 467)

The leading cases heretofore decided by this Court on the general subject of the right of the citizen to be immune from unreasonable search of his home or place of business are as follows, and are so well known and so firmly established as not to require quotation therefrom here:

Boyd vs. *U. S.*, 116 U. S. 616.

Adams vs. *N. Y.*, 192 U. S. 585.

Weeks vs. *U. S.*, 232 U. S. 382.

Amos vs. *U. S.*, 255 U. S. 313.

Silverthorne Lumber Co. vs. *U. S.*, 251 U. S. 385.

Gouled vs. *U. S.*, 255 U. S. 298.

Agnello vs. *U. S.*, 269 U. S. 20.

The failure of the government to produce in evidence the search warrant which they purportedly had obtained to search petitioner's home left the case in the same category as if the search had been made without a warrant.

Where it appears that the articles offered in evidence have been unlawfully seized, the Court is required to exclude them. *State* v. *Gunkel*, 188 Wash. 528, 63 P. (2d) 376.

Seizure of the articles at Petitioner's home cannot be sustained upon the theory that the seizure was incident to the arrest of petitioner. At that time petitioner had not been arrested. Nor can the seizure be justified because the officers claimed they had taken out a warrant for his arrest. The warrant itself was not put in evidence and even if it had it could not provide a subterfuge for an exploratory search of his home and its surroundings.

Last but not least, the officers did not have, so far as the evidence shows, facts within their knowledge which would be legally sufficient to authorize the issuance of a valid search warrant to search his home. The second clause of the Fourth Amendment provides that:

> "No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The still site was many miles from Petitioner's home. There was nothing found at the still connecting petitioner's home with the still or any article or articles in petitioner's home with the still or the operation thereof. Even if the officers had positively identified petitioner at the still, such would be no valid ground for a search of his home unless the officers had independent knowledge, not shown here to exist, that there were specifically named articles in petitioner's home which were subject to seizure. A warrant of arrest, or a right to arrest, cannot provide a basis for a valid search of the accused's home, especially where the officers do not have knowledge of such facts which would authorize the issuance of a search warrant to search the home.

Point 2.

The trial court should have required the government to show its legal authority for seizing the articles at petitioner's home before permitting the same to be introduced in evidence against him, notwithstanding petitioner's counsel at the trial failed to object thereto, inasmuch as the same involved a fundamental right of petitioner guaranteed by the organic law.

It was argued by government counsel that appellant is foreclosed from challenging the validity of the search or the right to introduce the articles seized because his counsel failed to object thereto when offered. It is of course the general rule that timely objections to inadmissible testimony should be made when the same is offered. But where fundamental rights specifically set forth as a part of the organic law is concerned, courts are not irrevocably bound by such mere rule of evidence. Such is definitely indicated by the Opinion of this Court in the case of *McNabb* vs. *U. S.*, 318 U. S. 332, wherein the conviction of petitioners in that case of murder of a Federal officer was reversed because of admission in evidence of evidence in violation of constitutional provisions. In the court of the opinion, Mr. Justice Frankfurter stated:

> "But where, in the course of a criminal trial in the federal courts, it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted or denied."
>
> (Citing *Gouled* vs. *U. S.*, Supra; *Amos* vs. *U. S.*, Supra; *Nardone* vs. *U. S.*, 308 U. S.338).

In the McNabb case the particular evidence not con-

stitutionally obtained was a confession. There was an objection made to the introduction of the confession but only upon the ground that it had not been shown to have been made voluntarily. No other ground was urged and the hearing by the lower court upon such motion (referred to by Mr. Justice Frankfurter in the quotation above) was a hearing solely touching the voluntariness of the confession. The issue was decided as a matter of law against McNabb and the proffered evidence admitted over the objection upon the ground stated. The conviction was upheld by the Circuit Court of Appeals but upon certiorari this Court deemed itself not bound by the limitation of the objection made in behalf of McNabb at the trial. In Mr. Justice Reed's dissenting opinion this precise observation was made in the following language:

> "Objection to the introduction of the confessions was made only on the ground that they were obtained through coercion. This was determined against the accused both by the court, when it appraised the fact as to the voluntary character of the confessions, preliminarily to determining the legal question of their admissibility, and by the jury. The court saw and heard witnesses for the prosecution and the defense. The defendants did not take the stand before the jury. The uncontradicted evidence does not require a different conclusion."

But the majority (all Justices except Justice Reed) went beyond the question of the voluntariness of the confessions and in fact passed it by without consideration. It was held that the confessions were wrongfully admitted in evidence because McNabb and the others had not been taken before a U. S. Commissioner immediately upon being arrested, in conformity with Federal Law and that because thereof statements made by them could not be lawfully received in evidence against

them. Such holding by this Court would seem to be clearly indicative of the proposition that, where fundamental constitutional rights are involved, mere technical rules of evidence must give way if they tend to obstruct the exercise by the citizen of his constitutional privileges.

As a further indication and tendency of this Court to look beyond the mere forms and procedural niceties in trials and to delve into and scrutinize with care the very heart and substance of the case to ascertain whether or not the accused received a fair trial and his constitutional rights protected, the case of *Malinski* vs. *the People of the State of New York,* 65 S. Ct. 781, is an eloquent testimonial. That case involved a conviction in a State Court of New York and was reviewed by this Court under the narrow limitations of the due process clause of the 14th Amendment. However, extensive observation was made by this Court with reference to the kind of trial which even the States accord their citizens in their own State Courts under the Federal Constitution. The Fourth to Seventh headnotes in this case are significant:

> "4. Where conviction in state court is before federal Supreme Court for review under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record discloses an infraction of one of the specific provisions of the first eight amendments, but whether defendant was deprived of the due process of law by which he was constitutionally entitled to have his guilt determined.
>
> "5. Judicial review of the guaranty of due process imposes on the Federal Supreme Court an exercise of judgment upon the whole court of proceeding to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking

peoples even toward those charged with the most heinous offenses.

"6. The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a mere personal judgment, and an important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review, but there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty.

"7. In reviewing a criminal conviction in a state court, the Federal Supreme Court must be mindful of the responsibilities of the state for the enforcement of criminal laws and exercise with due humility the merely negative function in subjecting the convictions from state courts to the very narrow scrutiny which the due process clause of the Fourteenth Amendment authorizes, and on the other hand no ear must be given to the loose talk about society being at war with the criminal if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people."

Present counsel for petitioner before this Court was not of counsel at his trial in the District Court and probably would have made objections to the introduction of the seized articles at the time they were offered at the trial. However, it is earnestly contended that fundamental rights of the citizen under the Constitution should not be bartered and frittered away just because of the temporary lapse of trial counsel, but that the doctrine many times announced by this Court to the effect that the trial court at all times zeaously guard the rights of the accused to the end that his fundamental rights be protected should be given substance and validi-

ty. This could be accomplished by the principle being laid down by this Court that before articles admittedly seized in the home of a citizen may be used in evidence in a criminal prosecution, the trial court should require the government to show that such search of the home and seizure of the articles therein was lawful under the Fourth Amendment. To permit less than this would in effect be an invasion of the accused's rights under the Fifth Amendment forbidding compulsory self-incrimination.

A number of Federal cases are authority for the proposition that the Court has the power on its own motion to correct on the face of the record errors which show flagrant disregard of the constitutional rights of the citizen, even though no objection or exception be made or preserved. In *McNutt* vs. *United States,* 267 Fed. 670, is was said:

> "While it is the general rule that objections and exceptions are necessary to entitle a party to review the judgment, in criminal cases, where the life or liberty of a citizen is at stake, the courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical errors in the trial, which appear to have been seriously prejudicial to the rights of defendant, although the questions they present were not properly raised or preserved by objection, exception, request or assignment of error."

And in *Humes* vs. *United States,* 182 Fed. 485, it was held:

> "A federal appellate court may consider a case in which the personal liberty of the defendant is involved, notwithstanding the insufficiency of the exceptions taken."

In *Van Gorder* vs. *United States,* 21 Fed. (2d) 939, it was said:

> "In criminal cases, federal appellate Courts may correct serious trial errors, though not challenged by motions."

See to the same effect *Peter* vs. *United States,* 23 Fed. (2d) 659. And in *Chavez* vs. *United States,* 23 Fed. (2d) 305, it was held:

> "Assignments that charge was argumentative, and that Court erroneously summed up evidence, may be considered, though no exceptions were saved."

In the Chavez case a review of the ruling made by the Circuit Court of Appeals was sought by the Government in this Court but certiorari was denied, 48 S. Ct. 588, 277 U. S. 591, 72 L. Ed. 1003. And in *Davis* vs. *United States,* 9 Fed. (2d) 826, it was stated:

> "In criminal cases involving accused's life or liberty, appellate courts, in interest of just enforcement of law, may correct serious trial errors fatal to accused's rights, though not challenged or reserved by objections, exceptions, or assignments of error."

The above rules have been further stated and applied in *Lamento* vs. *United States,* 4 Fed. (2d) 901; *Wyborg* vs. *United States,* 163 U. S. 632, 16 S. Ct. 1127, 41 L. Ed. 289; *Clyatt* vs. *United States,* 197 U. S. 207, 25 S. Ct. 427, 49 L. Ed. 726. Many other cases are cited in the opinions of the foregoing cases, particularly the Lamento case. The same holding was applied in *Savage* vs. *United States,* 270 Fed. 14, and when an appeal was sought to be taken by the government, certiorari was denied by this Court, 42 S. Ct. 54, 257 U. S. 644, 66 L. Ed. 413. Additional cases are *Colbaugh* vs. *United States,* 15 Fed. 929, where it was held that the "Circuit Court of Appeals may consider sufficiency of evidence to show guilt sua sponte" though not raised by any motion, objection or

exception. (*Schwartz* vs. *United States,* 10 Fed. (2d) 900, *Echikovitz* vs. *United States,* 25 Fed. (2d) 864).

In *Boyett* vs. *United States,* 48 Fed. (2d) 482, the record disclosed that during the entire progress of the trial in the United States District Court for the Southern District of Florida, there was not a single objection, exception or motion made by defense counsel during the trial. This fact the trial Judge so certified in his certificate settling the Bill of Exceptions, incorporated in the transcript filed in the appellate court. Notwithstanding all this, the Circuit Court of Appeals did consider all of the points raised upon appeal as to erroneous admission of evidence, erroneous instructions to the jury by the Court and the general insufficiency of the evidence to convict. The case was reversed upon such showing of error, notwithstanding the failure of objections by defense counsel, the Circuit Court of Appeals observing that authority to consider plain error on the face of the record was vested to that Court under Rule 24 and otherwise, even though technically not properly preserved or raised.

CONCLUSION

Petitioner respectfully submits that:

(a) Search of petitioner's home and seizure of the articles therein violated petitioner's rights under the Fourth and Fifth Amendments.

(b) The introduction of such articles so seized as aforesaid violated petitioner's rights under the Fifth Amendment.

(c) The full realization of petitioner of his rights under the Constitution should not necessarily be meas-

ured by the diligence of his trial counsel, inasmuch as at least a corresponding duty devolved upon the trial court to see that his fundamental rights were protected.

(d) The points involved in this case are fundamental and are such as call for the exercise of this Court's power of supervision.

Respectfully submitted,

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EXHIBIT A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

While this prosecution was grounded upon alleged violation of certain of the Internal Revenue Laws, yet there is no question herein presented or contended for which would necessitate consideration of such statutes, hence they are not herewith included. The sole question raised herein involves the application of the aforesaid Constitutional Amendments.

No. 1045

In the Supreme Court of the United States

October Term, 1945

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CITATIONS

654477—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 106

CLARENCE ARTHUR LANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 47–49) is reported at 148 F. 2d 816.

JURISDICTION

The judgment of the circuit court of appeals was entered April 24, 1945 (R. 49), and a petition for rehearing (R. 50–52) was denied May 17, 1945 (R. 53). The petition for a writ of certiorari was filed June 4, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Ap-

peals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court erred in admitting certain evidence obtained through an alleged illegal search and seizure, although petitioner did not move before trial to suppress such evidence and did not object to its admission at the trial.

STATEMENT

Petitioner and Walter D. Lane were indicted in the United States District Court for the Southern District of Florida in four counts. Count 1 charged them with carrying on the business of a distiller without having given bond as required by law (26 U. S. C. 2833); count 2, with possessing nontax-paid liquor (26 U. S. C. 2803); count 3, with carrying on the business of a distiller and distilling certain liquor with intent to defraud the United States of the tax on such liquor (26 U. S. C. 2833); and count 4, with working at a distillery upon which no sign bearing the words "Registered Distillery" was placed as required by law (26 U. S. C. 2831). (R. 1–4.) After a jury trial, petitioner was convicted on all counts (R. 41–42), and he was sentenced to two years' imprisonment on each of counts 1 and 3, two years and a day on count 2, and six months on count 4, the sentences on counts 1, 3, and 4 to run concurrently with the sentence on count 2; and, in ad-

dition, he was fined $100 on each of counts 1 and 3 (R. 7–8).[1] On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 47–49).[2]

ARGUMENT

Petitioner's sole contention (Pet. 5–6, 6–8; Br. 2–13) is that the trial court committed reversible error in admitting certain evidence which he alleges the Government obtained through an illegal search of his home, although admittedly he did not move before the trial to suppress such evidence and he did not object when it was offered at the trial. Petitioner argues that before evidence which has been obtained through a search and seizure may be admitted, it is incumbent upon the Government to show that the search and seizure were lawful, even though the defendant against whom such evidence is offered does not object to the admission thereof. The contention and argument are plainly without merit.

[1] At the close of the Government's case, Walter D. Lane withdrew his plea of not guilty and entered a plea of guilty (R. 28). He was sentenced to imprisonment for a year and a day on count 2; imposition of sentence on the other counts was suspended and he was placed on probation for five years to begin upon his release from imprisonment (R. 5–6).

[2] Petitioner does not challenge the sufficiency of the evidence to support his conviction (see Pet. 4), and, therefore, we deem it unnecessary to delineate the proof adduced at the trial. The evidence is summarized in the opinion of the circuit court of appeals (R. 48), and the facts relevant to the question presented by the petition are set forth at p. 5, *infra*.

It is settled that, unless there has been no opportunity to raise an objection in advance of trial, the court in the trial of a criminal case is not concerned with whether relevant evidence has been obtained through an illegal search and seizure. *Nardone* v. *United States,* 308 U. S. 338, 341–342; *Segurola* v. *United States,* 275 U. S. 106, 111–112; *Cromer* v. *United States,* 142 F. 2d 697, 699 (App. D. C.), certiorari denied, 322 U. S. 760; *United States* v. *Wernecke,* 138 F. 2d 561, 564 (C. C. A. 7), certiorari denied, 321 U. S. 771; *Smith* v. *United States,* 112 F. 2d 217 (App. D. C.), certiorari denied, 311 U. S. 663; *Nunes* v. *United States,* 23 F. 2d 905 (C. C. A. 1). *A fortiori,* the objection that a search and seizure violated the defendant's constitutional rights cannot be asserted for the first time on appeal. *Cromer* v. *United States, supra; Gregg* v. *United States,* 113 F. 2d 687, 691 (C. C. A. 8); *Lund* v. *United States,* 19 F. 2d 46, 68 (C. C. A. 8); *Linder* v. *United States,* 290 Fed. 173, 174 (C. C. A. 9), reversed on other grounds, 268 U. S. 5; *Singleton* v. *United States,* 290 Fed. 130, 131 (C. C. A. 4); *Lusco* v. *United States,* 287 Fed. 69, 70 (C. C. A. 2). In the instant case, the seizure of the articles introduced at petitioner's trial occurred on September 24, 1943 (R. 20). The trial took place on June 28, 1944 (R. 11–12). It is thus clear that petitioner had ample opportunity to question the legality of the search and seizure in advance of

the trial. Not having done so, and, in addition, not having objected to the admission of the articles at his trial below, he is now in no position to assert that the search and seizure were invalid and that the trial court should *sua sponte* have conducted an injury into the validity of the search and excluded the challenged evidence.

On the merits, petitioner's contention that the evidence was procured through an illegal search and seizure is equally untenable. The evidence in question consisted of a portion of a still, cartons containing glass jugs, several empty jugs, a jar containing syrup, and labels (R. 23). Investigators of the Alcohol Tax Unit testified that they saw these articles in the open near petitioner's house and in the garage when they went there on September 23, 1943, with a warrant for the purpose of arresting petitioner. No one was at home at the time, and the agents saw the articles while they looked about the house seeking petitioner. The next day they obtained a search warrant, searched petitioner's premises, and seized the articles. (R. 14–15, 17, 20.) In arguing that the search was illegal (Pet. 7; Br. 5), petitioner appears to proceed on the basis that the search originated from knowledge obtained by the agents through an "exploratory" search conducted the previous day. However, as pointed out by the court below (R. 49), the agents had the right to look for petitioner on that occasion,

and "What they saw was open to view, and can hardly be called a search."

CONCLUSION

The case was correctly decided below, in accordance with well-settled principles. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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